

In the United States Bankruptcy Court
for the
Southern District of Georgia
Waycross Division

In the matter of:

WAYMON N. HOLLINGSWORTH
(Chapter 7 Case 91-50220)

Debtor

THE BLACKSHEAR BANK

Plaintiff

v.

WAYMON N. HOLLINGSWORTH

Defendant

Adversary Proceeding

Number 91-5014

FILED
at 3 O'clock & 26 min P.M
Date 3/2/92
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

Debtor filed a Chapter 7 petition with this Court on April 2, 1991. On July 15, 1991, Blackshear Bank instituted this adversary proceeding alleging that Debtor was not entitled to a discharge under Section 727 and that the debt to The

Blackshear Bank was non-dischargeable under Section 523(a)(6). A trial was held on September 9, 1991. At the end of the trial, the matter was taken under advisement to consider the objection to discharge and complaint to determine dischargeability. Upon consideration of the evidence adduced at the trial, the briefs and other documentation submitted by the parties, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Blackshear Bank is a secured creditor of the Debtor, Waymon Nickey Hollingsworth. On August 22, 1986, Debtor borrowed \$8,365.76 from The Blackshear Bank. At the time, Debtor signed a promissory note and a security agreement in favor of The Blackshear Bank. On Plaintiff's Exhibit "1", the 1986 Consumer Time Note and Security Agreement, the security is described as 33.3 acres of hay on leased land in Pierce County, Georgia. Plaintiff's Exhibit "3", the separate Security Agreement for Farm Products also shows the 33.3 acres of hay in Pierce County, Georgia. Debtor grew hay on this land which was subject to the Bank's security interest.

On October 19, 1987, the Debtor renewed the note upon paying approximately \$1,200.00 to the Bank. On Exhibit "2", the 1987 renewal note, the same collateral, 33.3 acres of hay, is described. Debtor testified that he had sold some hay, approximately \$1,500.00 worth, and applied part of the proceeds to the note renewal. Charles N. Rowland, President of The Blackshear Bank, was present when the note was renewed and testified at the hearing. According to Rowland, Debtor stated at the time of the note renewal that he had sold the hay, was awaiting payment from a customer, and would remit the proceeds to the Bank when payment was received. Mr. Rowland also testified that Debtor told him he had enough due him to payoff the note given more time and showed him a financial statement with a \$20,000.00 hay inventory.

The Debtor made no additional payments to The Blackshear Bank, and the Bank obtained a default judgment in the Superior Court of Bacon County, Georgia, on September 24, 1988, in the amount of \$10,472.47. See Plaintiff's Exhibit "8".

By Order of this Court dated April 24, 1991, Debtor was ordered to appear at a 2004 examination and to produce certain documents including bank

statements and all records regarding Debtor's ownership and sale of hay. Debtor failed to produce any records for the 2004 examination, and failed to produce any records at the September 9, 1991, hearing with the exception of a 1986 Federal tax return.

The Blackshear Bank alleges that the Debtor's failure to keep and produce records is a basis for denying the Debtor a discharge pursuant to 11 U.S.C. Section 727(a)(3). The Bank also alleges that the Debtor's failure to obey the order to produce documents for the 2004 examination is sufficient to deny the Debtor a discharge under 11 U.S.C. Section 727(a)(6). Additionally, the Bank claims that Debtor's sale or conversion of the hay was a willful and malicious injury to its collateral pursuant to 11 U.S.C. Section 523(a)(6).

At the hearing, Debtor testified that part of the hay subject to the Bank's security interest was sold and that the rest of the hay was molded. Debtor, however, admitted that he did not remember telling anyone that the hay was molded and could not provide any other evidence to support his assertions that the hay had molded. Additionally, the Debtor produced no receipts or documents indicating that he sold the hay. Mr. Rowland testified that Debtor did not tell him about the hay

molding. Instead, Rowland testified that the Debtor told him he sold the hay and expected payment from a buyer. Mr. Rowland testified that Debtor did not say he did not have enough hay to pay off the debt. Rowland testified that he renewed the note after talking to the Debtor and seeing the financial statement with the sizeable hay inventory listed. Debtor indicated that the hay inventory shown on the financial statement was actually unmolded hay on other land not subject to the Bank's security interest. However, the Debtor produced the statement to the bank officer to show that the Debtor's hay operations in which the Bank had an interest had been successful.

Debtor testified that he understood his obligations to The Blackshear Bank. He testified that he had kept records, but admitted that he had not produced them. Debtor stated that he looked for his records from April to June and had talked to his ex-wife regarding the records. He explained that he had looked through storage at his grandmother's, at an old mobile home, and at a pack house where he stored his belongings after his divorce. Debtor testified that he did not maintain a bank account and had not had one for many years. He said that he had found some of his records, but had two more boxes to go through. Debtor produced only a 1986 tax return at the September hearing.

CONCLUSIONS OF LAW

Under Section 523(a)(6) of the Bankruptcy Code, the Court may refuse the debtor a discharge on any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. §523(a)(6). The act must be willful as well as malicious. In re Trudeau, 35 B.R. 185 (Bankr. D.Mass. 1983); In re Mills, 111 B.R. 186 (Bankr. N.D.Ind. 1988).

The burden of proof is upon the plaintiff excepting to discharge to show by a preponderance of the evidence that a discharge is not warranted. Grogan v. Garner, ___ U.S. ___, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). This Supreme Court decision held that the preponderance of the evidence standard, instead of the clear and convincing evidence standard, should apply to all of the exceptions to discharge provisions of 11 U.S.C. Section 523(a).

Under Section 523(a)(6), the creditor first must prove that the debtor willfully damaged the creditor's property. A willful act under Section 523(a)(6) must be deliberate and intentional. Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th

Cir. 1988); Lee v. Ikner (In re Ikner), 883 F.2d 986 (11th Cir. 1989).

The Eleventh Circuit distinguished willful from malicious in Rebhan, above, concluding that Congress intended willful to mean "deliberate and intentional" not merely reckless; whereas, a finding of recklessness was sufficient to meet the malice requirement of Section 523(a)(6). The Eleventh Circuit, following United Bank of Southgate v. Nelson, 35 B.R. 766, 774 (N.D.Ill. 1983), concluded that "malice for purposes of Section 523(a)(6) can be established by a finding of implied or constructive malice." Rebhan at 1263.

Besides proving willfulness, a plaintiff excepting to discharge must show that the debtor acted maliciously. Rebhan at 1263. A conversion which is wrongful and done without just cause or excuse is malicious. In re Lindberg, 49 B.R. 228, 230 (Bankr. D.Mass. 1985); In re Askew, 22 B.R. 641, 643 (Bankr. M.D.Ga. 1982), aff'd 705 F.2d 469 (11th Cir. 1983). An injury is "willful" if it is intentional and "malicious" if it results from an intentional or conscious disregard of one's duties. Id. The conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, is a willful and malicious injury under Section 523(a)(6). Matter of McLaughlin, 14 B.R. 773, 775 (Bankr.

N.D.Ga. 1981).

The Debtor must be aware that the act violates the property rights of another for the act to be willful and malicious. Matter of Brinsfield, 78 B.R. 364, 368 (Bankr. M.D.Ga. 1987). Although Section 523(a)(6) does not refer to security interests, a "willful and malicious injury" under this Code section may include a willful and malicious conversion of security. S.Rep.No. 989, 95th Cong., 2d Sess. 79, reprinted in 1978 U.S. Code Cong. & Admin. News S787; In re Pommerer, 10 B.R. 935, 940 (Bankr. D.Minn. 1981). A showing that the Debtor was aware of a creditor's security interest and acts in deliberate disregard of a security interest meets the test for malice in Section 523(a)(6). See In re Eberle, 61 B.R. 638, 648 (Bankr. D.Minn. 1985).

At the hearing, Debtor admitted that he understood his obligations to the Bank. He knew that the Bank had a security interest in the hay. Debtor benefitted from the Bank's renewal of his note in which Debtor was allowed additional time to pay back the note. Debtor told Mr. Rowland that he had sold some hay and would remit the proceeds to the Bank. Debtor understood his obligation to forward the sales proceeds of the collateral to the Bank but failed to do so. The Debtor's

actions were intentional, deliberate, and in disregard for the creditor's rights. Such sale of the Bank's collateral without remitting the proceeds is a willful and malicious injury to the collateral. Debtor did not produce any receipts indicating the amount he received from the sale of hay or corroborate his testimony in any way. Debtor testified that some of the hay had molded. However, Debtor failed to inform the Bank of the molded hay and loss of its collateral at the time of the occurrence.

Mr. Rowland's testimony contradicted the Debtor's testimony. According to him, Debtor spoke only of good results from his hay operations. Mr. Rowland testified that Debtor told him he expected a large payment from his hay sale. Also, at the time of the note renewal, Debtor showed Mr. Rowland a financial statement indicating a significant hay inventory.

The Blackshear Bank has presented sufficient evidence to determine that Debtor willfully and maliciously converted the Bank's collateral. Mr. Rowland's testimony at the hearing was much more credible and persuasive than Debtor's testimony. Debtor's mere assertions that the hay had molded without additional evidence is insufficient to overcome the creditor's proof of a willful and malicious injury. Whether the hay was sold or molded, the Debtor misled the Bank either as

to its condition or in converting the collateral.

Additionally, Blackshear Bank has argued that the Debtor should be denied a discharge pursuant to Sections 727(a)(3) and 727(a)(6). Under Bankruptcy Rule 4005 the burden of proof falls upon the creditor objecting to the Chapter 7 debtor's discharge. This burden must be met with clear and convincing evidence. In re Mart, 87 B.R. 206 (Bankr. S.D.Fla. 1988); In re Cohen, 47 B.R. 871 (Bankr. S.D.Fla. 1985).

The Bank has shown that the Debtor failed to produce records concerning his hay sales and other financial records except for one tax return. Once a plaintiff has stated a reasonable objection to the debtor's discharge based on his lack of preservation of financial records, the burden shifts to the debtor to justify his failure to keep those records, Goff v. Russell Company, 495 F.2d 199, 201 (5th Cir. 1974).

Although Debtor may have been negligent in not keeping track of the whereabouts of his records he did provide some explanation for his failure to maintain and produce the records. First, Debtor said he had not maintained a bank account in many years and thus had no bank statements to keep. According to Debtor's

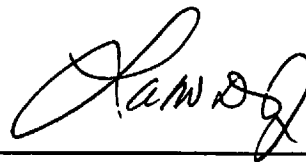
testimony, he had a small unsophisticated farming operation. Debtor said he was recently divorced and that he had to store his belongings and records in several different places, which made finding the needed items difficult. Debtor did provide a 1986 tax return indicating at least some attempt to comply with the Court's order and the Bank's request for documentation.

Although Debtor willfully and maliciously converted the Bank's collateral and failed to provide documentation for his hay sales, his failure to produce records is not sufficient to deny Debtor a discharge in light of his particular situation and difficulty in finding his stored belongings. The Bankruptcy Court is a court of equity. The provisions denying a discharge to debtor are to be construed liberally in favor of the debtor and strictly against the creditor." 4 Collier on Bankruptcy ¶727.01A at 727-10 (15th Ed. 1991). Also, the Chapter 7 trustee has failed to assert any interest in the outcome of this proceeding. In light of Debtor's testimony, his failure to keep and produce records does not reflect the requisite dishonesty and wrongfulness required to deny Debtor a discharge.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law,
IT IS THE ORDER OF THIS COURT that Debtor's debt to the Plaintiff in the
amount of \$13,974.00 shall be deemed non-dischargeable.

ORDERED FURTHER that Plaintiff's objection to Debtor's discharge
under Section 727 is hereby overruled.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 28th day of February, 1992.